The Strange Career of Affirmative Action

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Affirmative action is hotly debated by proponents and opponents, who share a passionate conviction about their respective viewpoints and who believe that affirmative action as we currently know it will be eliminated in the near future. In this Article, Professor Hochschild discusses the electoral future of affirmative action and predicts that affirmative action will not be defeated at the polls in more than a few jurisdictions in the foreseeable future. Professor Hochschild substantiates her prediction with an explanation of several factors—state population size, the role of direct initiatives, the political impact of African-American and Latino residents—that affect the electoral prospects of anti-affirmative action activity. Alternatively, Professor Hochschild advances the argument that affirmative action might be abolished through the judicial system over the next few years. She concludes with a discussion of whether one can morally endorse (decry) judicial activism in this arena if one decried (endorsed) it in the arena of school desegregation.

I. INTRODUCTION

I can best begin to depict the strange career of affirmative action through a comparison of four quotations:

> I am just curious: is there a difference between Pete Wilson and George Wallace? I am afraid that we do not know the context of today's existence as black people in America. George Wallace, in a failing effort, stood in the school house door. Pete Wilson, in an ascendant effort, is re-establishing the legitimacy of white privilege. The precipitous decline of black enrollment in higher education in California and Texas is just the tip of an iceberg.[1]

> This latest ruling by the U.S. Supreme Court is but another knife into the dying corpse that was at one time a living commitment to correcting and abating past disparities that were codified by federal and state statutes in this country. . . .

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[1] Electronic mail from Robert Newby, Chair and Professor, Department of Sociology, Anthropology, and Social Work, Central Michigan University, to Association of Black Sociologists Listserv <ABSLST-T@CMUVM.CSV.CMICH.EDU> (June 24, 1997) (on file with author).

> Indeed, the writing is not only in the legal books but it is now of the wall, that the civil rights gains made in the 60's, 70's, and for a brief time during the later 80's, are slipping away like a barrel over Niagara Falls.
>
> . . . That which civil rights warriors fought and died for is now being cast aside and spat on by those who waited in the weeds to strike at the most opportune moments.[2]

> We have momentum, public opinion, and the forces of history solidly on our side. Despite determined opposition, the era of race preferences is coming to an end.[3]

> Understand, this [elimination of "race preferences"] is something that is going to happen. It's not a matter of if. It's a matter of when. Beyond being unconstitutional, it's immoral. Just plain wrong. And the faster we can make it happen, the better off our society will be. So whatever I can do to help hasten that, I will do it.[4]

Disagreements between the first two quotations and the second two are obvious. For the first two writers, a robust program of affirmative action is essential to the continuation of the civil rights movement and more generally to the attainment of racial and ethnic equality in the United States. But to the second pair, affirmative action is antithetical to the deepest American values of equality and individual merit, a gross distortion of the civil rights movement, and a barrier to attaining racial and ethnic equality. This article will *not* explore the substantive and philosophical differences between these positions; many scholars have done so, including some in this volume, and I have other concerns here.

I seek instead to focus on two characteristics that all four quotations share, despite their substantive differences. First, both supporters and opponents of affirmative action are passionately committed to their perspectives and concede no moral legitimacy to the other side. Second, both supporters and opponents believe that affirmative action is going to be eliminated, at least as we know it, in the near future. I will argue that the first stance is inappropriate and unhelpful and that the second prediction might be correct but for nonobvious

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[2] Electronic mail from Steve Higginbotham Braunginn, Deputy Director/Associate Administrator, Wisconsin Clearinghouse for Prevention Resources, to Association of Black Sociologists Listserv <ABSLST-L@CMUVM.CSV.CMICH.EDU> (June 20, 1997) (citation omitted) (on file with author).

[3] *Efforts Gear Up Nationwide to Curb Racial Preferences* (visited Feb. 2, 1998) <http.//www.instituteforjustice.org...es/civil/RACECON_CR_2_04_98pr.html> (statement of Clint Bolick) (on file with author).

[4] Trevor Coleman, *Affirmative Action Wars*, EMERGE, Mar. 1998, at 30, 36 (quoting John Uhlmann).

reasons.

A. *Passionate Conviction*

I will not repeat what I have written elsewhere about advocates' intense commitment to one or the other side of the debate over affirmative action,[5] but a few observations are relevant here. First, over the past three decades very few of the hundreds of writers and speakers on the issue have changed their minds, or even modified their views.[6] Nathan Glazer made a very public shift soon after California abolished affirmative action in the public realm: "In the presence of [these] conditions [terrible schools in inner cities, family dissolution, the growth of an embittered black underclass], an insistence on color-blindness means the effective exclusion today of African Americans from positions of influence, wealth, and power. It is not a prospect that any of us can contemplate with equanimity. We have to rethink affirmative action."[7]

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[5] *See* Jennifer Hochschild, *Affirmative Action As Culture War*, *in* THE CULTURAL TERRITORIES OF RACE: WHITE AND BLACK BOUNDARIES 615, 615–39 (Michele Lamont ed., forthcoming 1998).

[6] One can contrast this fact with other policy arenas in which highly visible public actors have (occasionally) changed their minds. Welfare politics for years resembled affirmative action politics, in that advocates held much more stringent positions than did most Americans. *See* STEVEN M. TELES, WHOSE WELFARE?: AFDC AND ELITE POLITICS 41–59 (1996). But welfare politics changed dramatically in the mid-1990s. President Clinton campaigned on a pledge to "end welfare as we know it." *Id.* at 135. He later signed and defended legislation that was not completely to his liking, but that certainly changed the welfare system dramatically. A considerable number of Democratic officials at all levels of government supported the new welfare legislation. *Id.* at 134–38, 153–62.

Vouchers for private (and possibly parochial) schools are another arena in which passionate advocates hold strong and unswerving positions, but the public holds ambivalent or more mixed views. The politics of school vouchers may come to look more like that of welfare than that of affirmative action; that is, elites might soon be prepared to experiment extensively with new formulations of public schooling. Former Congressman Floyd Flake and other Democrats have recently endorsed school vouchers after a history of strong support for public education; educators increasingly endorse hybrid structures such as charter schools, privately-run public schools, contracts with private schools for particular services, and so on.

[7] Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18. Glenn Loury made the same shift at about the same time:

> I have been a critic of affirmative action policies for more than fifteen years . . . . However in the wake of a successful ballot initiative banning affirmative action in California, I now find it necessary to reiterate the old, and in my view still valid, arguments on behalf of explicit public efforts to reduce racial inequality. The current campaign against "preferences" goes too far by turning what before Proposition 209 had been a reform movement into an abolitionists' crusade.

From the other side of the liberal-conservative spectrum, *Mother Jones* magazine published a series of articles in 1997 questioning its previous support for affirmative action—and was rewarded with excoriation in the letters to the editors column over the next few issues.[8] But these reformulations are as notable for their rarity as for the vehemence with which the apostates are attacked.[9]

The lack of movement by proponents on both sides of the issue is surprising for three reasons. First, most ordinary citizens do not hold impassioned or extreme views on the subject, and many are willing to change their mind about it. Survey data show more of a moderate center on affirmative action, one that is shared across races, than either the advocates or the media reflect. Thus, while three-fourths of white Americans consistently agree that blacks should "work their way up . . . without any special favors," so do about half of black Americans.[10] Although 85% or more of whites endorse "ability" rather than "preferential treatment" to determine who gets jobs and college slots, so do about three-fifths of blacks.[11] Conversely, fully seven in ten whites (compared with over eight in ten African Americans) favor affirmative action programs "provided there are no rigid quotas."[12] Solid majorities in both races endorse special job training and educational assistance for women and people of color, extra efforts to identify and recruit qualified minorities, and redrawing voting districts to ensure minority representation.[13] A day after President Clinton was reelected, two-thirds of Americans agreed that he should "put more emphasis on affirmative action to improve educational and job

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Glenn Loury, *An American Tragedy: The Legacy of Slavery Lingers in Our Cities' Ghettos*, BROOKINGS REV., Spring 1998, at 38, 42.

[8] *See America's Changing Colors*, MOTHER JONES, Sep./Oct. 1997 (special issue); MOTHER JONES, Nov./Dec. 1997 (letters to the editor).

[9] Thomas Sowell, for example, described Glenn Loury's statement of partial support for affirmative action as full of "soothing, sloppy words" and as an "exercise in inconsistency or cosmetics." Glen Loury, *Nasty Nuances and CCRI*, WKLY. STANDARD, Feb. 17, 1997, at 6 (quoting response by Thomas Sowell). In addition to the letters to the editor that *Mother Jones* itself published, the magazine received the "Enemy Within" award from *RaceFile*, a publication of the Applied Research Center, Oakland, California.

[10] Charlotte Steeh & Maria Krysan, *Affirmative Action and the Public, 1970–1995*, PUB. OPINION Q. 128, 130–31 (1996).

[11] *See id.* at 130–31.

[12] *Id.* at 132.

[13] *See id.* at 128–29; *see also Affirmative Action*, GALLUP POLL SPECIAL REPORT (The Gallup Organization, Princeton, N.J.), July 1995, at 24; *Affirmative Action*, *POLLING* REP. (The Polling Report, Inc., Washington, D.C.), Dec. 22, 1997, at 1,3 (citing CBS News/*N.Y. Times* poll).

opportunities for women and minorities."[14]

Opinions on certain forms of affirmative action are not only more supportive than typically perceived, but they are also more malleable and less important to most citizens' political stances than one would imagine from most public discourse about the subject. About a third of white Americans cannot make any association whatsoever with the phrase, "affirmative action."[15] One quarter of those who voted for California's referendum banning affirmative action in 1996 would have preferred a "mend it, don't end it" option.[16] Between one-fourth and one-half of self-identified Democrats or liberals in recent polls have expressed either opposition to affirmative action or concerns that it has "gone too far,"[17] or agree that "blacks and women have taken advantage of it."[18] Conversely, up to half of Republicans worry only a little or not at all that recipients of affirmative action are taking advantage of it.[19] In June 1996, as the debate over the subject was heating up in national politics, fewer than one in five whites claimed that affirmative action would be extremely important in deciding their presidential preference.[20] Exit polls in California the day after Proposition 209 passed found that for neither Republicans nor Democrats "was affirmative action mentioned as one of the top seven issues."[21] Affirmative action, in short, does not typically polarize the

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[14] *Clinton's Second Term*, *POLLING* REP. (The Polling Report, Inc., Washington, D.C.), Nov. 18, 1996, at 1 (citing Princeton Survey Research Associates for *Newsweek*, Nov. 2–4, 1996).

[15] *See* Steeh & Krysan, *supra* note 10, at 129.

[16] *See* Edward W. Lampinen, *Affirmative Action Foes Span Spectrum*, S.F. CHRON., Nov. 22, 1996, at B1.

[17] *Washington Post* Poll, July 10–14, 1996, *available in* Public Opinion Online, accession no. 0265919, POLL file; NBC News/*Wall Street Journal* Poll, Sept. 16–19, 1995, *available in* Public Opinion Online, accession no. 0248113, POLL file; NBC News/*Wall Street Journal* Poll, Mar. 4–7, 1995, *available in* Public Opinion Online, accession no. 0232835, POLL file; NBC News/*Wall Street Journal* Poll, Mar. 4–7, 1995, *available in* Public Opinion Online, accession no. 0232836, POLL file.

[18] CBS News Poll, Oct. 23–27, 1996, *available in* Public Opinion Online, accession no. 0267429, POLL file; *see also Washington Post*, Kaiser Foundation, Harvard University Poll, July 22–Aug. 2, 1996, *available in* Public Opinion Poll Online, accession no. 0307969, POLL file (asking respondents if "a major reason the economy is not doing better than it is" includes "women and minorities get too many advantages under affirmative action").

[19] *See Washington Post* Poll, July 10–14, 1996, *available in* Public Opinion Online, accession no. 0265906, POLL file (asking respondents if "too many people take advantage of affirmative action").

[20] *See* NBC News/*Wall Street Journal* Poll, June 20–25, 1996, *available in* Public Opinion Online, accession no. 0259637, POLL file.

[21] Bruce E. Cain & Karin MacDonald, *Race Was a Dull Wedge in California's 1996*

public's attitudes.

A second reason for surprise at the almost unanimous immobility of advocates' convictions is the fact that the evidence does not warrant immovable commitment on either side. Studies of the effects of affirmative action are surprisingly sparse and very recent.[22] But the few in existence show that affirmative action works much like most other public policies: it benefits a few people greatly, benefits a larger number somewhat, harms a few, and does not affect the majority of Americans in one way or the other. That broad conclusion obtains for hiring and promotion decisions as well as for admission into universities.[23]

Affirmative action has made a notable difference in employment in the largest firms and in public employment such as fire and police departments, social work, and probably, public school teaching.[24] But more and better education, enforcement of laws against wage and employment discrimination, and migration to the North and urban areas are responsible for most of the reduction in the gaps between blacks' and whites' wages and job status over the past four decades.[25]

With regard to universities, during the 1980s the most selective four-year colleges and universities were more likely than other institutions of higher education to admit African American and Latino students preferentially.[26]

Presidential Campaign, PUB. AFFAIRS REP., Mar. 1997, at 12 (inquiring about presidential votes). The issue of affirmative action is much more salient to African Americans than to members of any other race or ethnicity. In a 1996 survey, over half of blacks said that affirmative action would be extremely important in deciding their vote for president. *See id.* In a California poll a few days before the 1996 election (in which Proposition 209 would be decided on), twice as many blacks as whites (23% to 12%) said that they would change their vote for president depending on the candidates' stance on the proposition. *See id.* This point will become important in my later discussion of the political future of affirmative action. *See infra* Part III.

[22] On this dimension, affirmative action differs from welfare policy—about which there is a long tradition of not-always-consistent empirical research—and resembles debates over school choice.

[23] *See* Hochschild, *supra* note 5, at 622–26; WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998); BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT (1998).

[24] *See* HARRY J. HOLZER & DAVID NEUMARK, WHAT DOES AFFIRMATIVE ACTION DO?, 4–5, 33–37 (National Bureau of Econ. Research Working Paper No. 6605, 1998).

[25] *See* James Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138, 173–74 (1989).

[26] *See* Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, *in* THE BLACK-WHITE TEST SCORE GAP 431 (Christopher Jencks & Meredith Phillips eds., 1998), *reprinted in* 59 OHIO ST. L.J. 971 (1998).

There is no reason to think that energetic affirmative action practices harmed these elite schools; by the end of the decade, their tuition had risen disproportionately compared with that of other universities, as had the number of students applying for admission.[27] In non-elite schools, which 80% of college students attend, admission rates for students of different races with similar characteristics were essentially the same.[28]

No systematic evidence shows harm to beneficiaries of affirmative action in either universities or jobs. In fact, the best studies show clear benefits to affirmative action recipients.[29] It is difficult to find evidence of harm to identifiable whites beyond the fact that every year many applicants (most of whom are white) do not attain a coveted slot in Harvard's first-year class or do not receive the promotion that they believe they deserve. That failure to attain what they wish and perhaps warrant is painful, but it is not a violation of rights or even necessarily of deserts. If affirmative action does little harm, however, it also does little good where help is most desperately needed—in inner cities and rural communities where some African Americans remain mired in unsafe neighborhoods, substandard housing, atrocious schools, and joblessness.

Finally, one might be surprised at the depth of advocates' mutual animosity because, at base, proponents of all sides of the debate over affirmative action appeal to the same values—equal opportunity, fairness to all participants, the American dream of success, and racial integration.[30] They clearly differ in their definition of these values, with the chief discrepancy lying in the distinction between "individual rights" and "group rights." But that distinction is analytically fuzzy, to say the least. Philosophically, it is perfectly possible to favor the pursuit of both kinds of rights. In fact, most proponents of affirmative action agree that the government should sustain individual rights *as well as* enhance group rights; similarly, most opponents concur that the government should respect group identities and sensitivities *as well as* protect individual rights. Thus, in the context of a broad set of possible values to draw upon and potential conflicts among values, the moral debates swirling around the issue of affirmative action do not cut very deep philosophically or normatively.

In short, the passion with which both proponents and opponents of affirmative action argue their case seems out of proportion to its tangible consequences for most Americans. It grows instead from the symbolic value of

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[27] *See* CHARLES T. CLOTFELTER, BUYING THE BEST 58–81 (1996).

[28] *See* Kane, *supra* note 26.

[29] *See* Robert Davison & Ernest Lewis, *Affirmative Action and Other Special Consideration Admissions at the University of California, Davis, School of Medicine*, 278 JAMA 1153, 1153–58 (1997); BOWEN & BOK, *supra* note 23.

[30] This observation also holds for intense debates over some other policy issues, such as welfare or health care policy, but not for others such as the death penalty or abortion.

affirmative action for a small proportion of the population. I seek here not to explain this passion, but instead to show how its roots in symbolic rather than material import will affect the political future of affirmative action. That leads me to the second similarity between the two pairs of quotations with which I started—their shared conviction that affirmative action will soon be abolished.

B. *The Predicted Demise of Affirmative Action*

Voters have had three chances to decide the fate of public or state-supported affirmative action—in California where it was abolished via Proposition 209[31] in November 1996, in Houston, Texas, where it was retained via Proposition A[32] a year later, and in Washington state where it was rejected in November 1998. In approximately twenty-five other states, there has been or currently is anti-affirmative action activity in the electoral arena.[33] That activity comprises proposals for legislation, state constitutional amendments, and propositions for direct citizen votes. Its purpose is to abolish the practice of affirmative action—sometimes defined as preferential treatment or set-asides—by any public agency or actor.[34] In eight states, legislators have submitted bills to promote public sector affirmative action. One such bill passed in Oregon. I will not consider the pro-affirmative action activity further in this article. Figure 1[35] identifies the fifty states by evidence of politically organized opposition to the public use of affirmative action between 1995 and the summer of 1998.

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[31] 1996 Cal. Legis. Serv. Prop. 209 (West) (enacted as CAL. CONST. art. I, § 31 in 1996, "The State shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting").

[32] *See* Julie Mason, *Court Backs Proposition A Ballot Wording; Appellate Ruling Delivers Setback to Affirmative-Action Opponents*, HOUS. CHRON., Nov. 27, 1997, at A1 (as corrected).

[33] I received the idea for conducting this analysis and the initial list of states from a helpful paper by Kellough, Selden, and Legge. *See* J. Edward Kellough et al., Affirmative Action Under Fire: The Current Controversy and the Potential for State Policy Retrenchment (Aug. 28-31, 1997) (paper for presentation at the Ninety-third Annual Meeting of the American Political Science Association) (on file with author).

[34] We generated the list of states in which there is "anti-affirmative action activity" through a Lexis-Nexis search of all states from January 1995 through July 1998. We confirmed these results with the website entitled Leadership Conference on Civil Rights Online Center: Affirmative Action in the States. *See* <www.civilrights.org/aa/state.html> (visited Aug. 20, 1998). In some states, there has been more than one such activity in a legislative session, or activity over several years. However, because the unit of analysis in the discussion below is states, I combined all activities into the "yes" side of a yes/no dichotomy.

[35] *See infra* Part II.A.

In no state beyond California and Washington has the anti-affirmative action measure come close to passage. Neither is it demonstrably on the way to a final decision in any other state (although I write so soon after the 1998 election that its effects are completely unknown as yet). In four states that have seen anti-affirmative action proposals, the measures died in 1995 or 1996, and have not been revived.[36]

At the national level, several bills have been submitted to the House of Representatives or the Senate over the past few years. Few have come to a vote even in committee, and none have come close to passage by either branch of Congress.

How should we make sense of this history? Are California and Washington anomalies or the precursor to a future that has not quite arrived yet? All four of the writers whom I quoted at the beginning of this Article, and most commentators on Proposition 209 (until recently), assumed the latter. Based on electoral and demographic trajectories, I assume the former.

II. THE ELECTORAL FUTURE OF AFFIRMATIVE ACTION

A wise economist in public service once warned his audience that, to retain his job, he had learned never to give a number and a date at the same time. Not being an economist or in public service, I shall violate this advice and predict that affirmative action will not be defeated at the polls in more than a handful of jurisdictions other than California and Washington (the number) in the foreseeable future (the date). My grounds for that prediction begin with a systematic analysis of which states have experienced anti-affirmative action activity. It then uses the results of that analysis to point toward a set of explanations for why that activity has not, and arguably will not, generate substantial change in affirmative action laws.[37]

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[36] Nevertheless, to be conservative I include them among the "anti-affirmative action activity" states in the analyses below.

[37] Authors of a few recent articles have shifted from the general study of diffusion of innovation across states, or patterns of similarity and dissimilarity in state cultures and structures, to analyses of variations in particular state-level policies. *See* Frances Berry & William Berry, *State Lottery Adoptions as Policy Innovations*, 84 AM. POL. SCI. REV. 395, 395–415 (1990); RODNEY HERO, FACES OF INEQUALITY: SOCIAL DIVERSITY IN AMERICAN POLITICS (1998); DAVID NICE, POLICY INNOVATION IN STATE GOVERNMENT (1994). My analysis is in that sense (if no other) similar to theirs. For a systematic and recent summary of findings about diffusion of innovations across states, see Scott P. Hays, Innovation Diffusion: What We Know (Apr. 23–25, 1998) (paper for presentation at the Midwest Political Science Association Annual Conference) (on file with author).

A. Patterns of Support for Anti-Affirmative Action Measures

Five (sometimes compound) hypotheses summarize our search for differing patterns between the states with and without anti-affirmative action campaigns between January 1995 and mid-1998:

- *The demographic hypothesis: Anti-affirmative action activity is likely to increase given high or rising percentages of non-whites in a state's population.*

This is the simplest explanation—that anti-affirmative action activity constitutes a straightforward reaction among whites to the apparent threat implied by "de-Anglicization." Related to this general hypothesis are particular hypotheses about levels and trends in state populations of particular non-Anglo groups (the absolute number of blacks in a state, the trends in Asian and Hispanic populations, and so on).

- *The "high profile" states hypothesis: Anti-affirmative action activity is more likely to occur in populous, urbanized, or prosperous states.*

The appearance of anti-affirmative action campaigns in so many populous and prominent (but otherwise diverse) states—including California, Texas, New York, Illinois, Florida, Michigan, and Pennsylvania—inspired this hypothesis. Wealthy states might offer slack political and financial resources that can be put to use in an initiative campaign, regardless of the issue. States with large populations might be unusually tempting targets for electoral strategists, especially in presidential campaigns where the electoral college magnifies the importance of the most populous states. They also offer the greatest likelihood, arithmetically, that a political entrepreneur will arise to conduct an anti-affirmative action campaign. Furthermore, states with substantial urban or metropolitan populations might be arenas for heightened racial conflict.

- *The regional hypothesis: Anti-affirmative action activity is likely to be most common in the South and West.*

Although this argument runs counter to the hypothesis about high-profile states, one might expect the most anti-affirmative action activity in the deep South and far West, and the least such activity in the liberal Northeast. The former states have a long history of state support for racial policies preferred by whites (in the case of the South), or of resistance to government regulation and social policy (in the case of the West).

- *The institutional hypothesis: Anti-affirmative action activity is more likely to occur in states in which the state constitution allows for direct ballot initiatives.*

Ballot initiatives are only one of the several ways in which anti-affirmative action activity may become state law. But they uniquely permit opponents of affirmative action to take direct advantage of the fact that most citizens oppose affirmative action when it is associated with preferences or quotas. Proposals for legislative action, in contrast, must run the gauntlet of legislatures, which are well-known to be better suited to halting rather than promoting controversial legislation.

- *The party control hypothesis: Anti-affirmative action activity is more likely to occur under unified Republican state governments.*

Other than ballot initiatives, state legislatures are the primary venues for non-judicial anti-affirmative action activity. More such bills seem likely to be introduced in states in which the governor is Republican and both branches of the legislature are controlled by the Republican party, for two reasons: (1) the chance of passing a bill abolishing affirmative action in the public sector is higher, and (2) the majority of voters already have demonstrated their relative conservatism so they are less likely to punish promulgators of a conservative bill.

Formal evaluation of these hypotheses is complicated by two factors—having only fifty observations (one for each state) and having a "dummy" dependent variable (a variable with only two possible values, 0 or 1, based on whether a state had anti-affirmative action activity).[38] I therefore will first discuss the full range of variables with which anti-affirmative action activity is substantially correlated, and only then present a parsimonious and predictive model of anti-affirmative action activity.[39]

To evaluate the demographic hypothesis, we first tested for a relationship

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[38] Luckily, these two difficulties in the data pull in opposite directions. That is, while the technique of logistic regression tends to inflate the regression statistics given that the model has only to make an up or down guess as to the value of the dependent variable, the small sample size makes for a very difficult test of the statistical significance of the other results.

[39] For data used to evaluate these hypotheses, see THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES: 1996–1997, 209 tbl.5.15 (1996) (for list of states with direct initiatives); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 12 tbl.10, 13 tbl.11, 28 tbl.26, 34 tbl.34, 40 tbl.42, 283 tbl.453, 284 tbl.454, 450 tbl.696 (1997) [hereinafter STATISTICAL ABSTRACT] (including undocumented immigrants, legal immigration, racial population of states, partisan composition of state governments, total population, percentage metropolitan, and state gross domestic product).

between anti-affirmative action activity (hereafter "activity") and the percentage of whites in a state's population in 1994. This broad formulation of the hypothesis was weakly confirmed; white population levels show the predicted negative correlation with activity, but only at a moderate magnitude ($r = -.268$) and with a borderline degree of statistical significance. Tests for relationships between activity and percentages of blacks and Hispanics in state populations also generally supported the broad demographic hypothesis. Correlations for percentages of blacks ($r = .365$) and Hispanics ($r = .195$) with activity were in the predicted positive direction, and the former was highly statistically significant.[40] Finally, as the demographic hypothesis would predict, we found a positive and significant relationship between 1996 legal immigration levels for each state and activity ($r = .338$; $p = .016$), and a positive, though weak, relationship between legal immigration per capita and activity.[41]

We next tested the demographic hypothesis in terms of population *trends* between 1980 and 1996. We did this only for states in which a given racial or ethnic group constituted more than 3% of the total population in 1996 because trend data for states in which a given group is smaller are very misleading. After several experiments, we imputed the missing trend data by assigning 0s to those states in which a given racial/ethnic group comprised less than 3% of the population.[42] Using that technique, we found clear positive relationships between activity and an increase in the black population ($r = .286$; $p = .044$),

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[40] However, the correlation between anti-affirmative activity and Asian-American population levels was negative ($r = -.094$), although minimal and not statistically significant. We also found a negative, but minimal, relationship ($r = -.122$), between anti-affirmative action activity and population levels of Native Americans. Significance levels for whites were .060, for blacks .009, for Hispanics .174, for Asians .515, and for Native Americans .399.

[41] Immigration per capita correlated .231 with activity, with a significance level of .106. No variable that measured immigration per capita proved significant.

[42] We also analyzed the cases for which there were no "missing" data—34 cases for black trends and 22 cases for Hispanic trends. This made it possible to develop a "perfect" logistic regression model for anti-affirmative action activity using Hispanic population trends, black population levels, and a dummy variable representing the existence of a direct initiative process. Unfortunately, the model remained rather trivial inasmuch as it applied only to 22 states. Finally, we imputed to the lowest minority states (<3%) the statistics for the next-lowest minority states (3–5%). The correlations in this case were trivial and statistically insignificant.

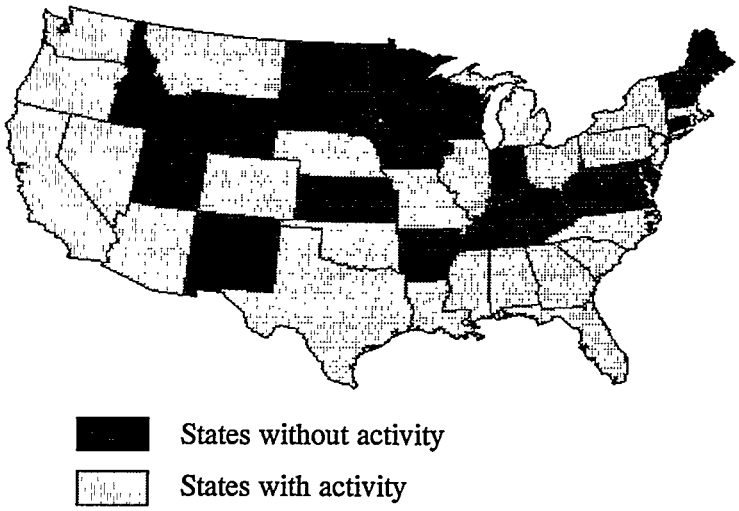
It is inappropriate to assign a value for trends in states with very small populations of a given racial or ethnic group, because an apparently large increase from a tiny base is misleading (consider the meaning of a 300% increase in a population that moves from 100 members to 400 members in a state over 15 years). *See, e.g., The Black Population is 20 Percent or Higher in 7 Southern States, Maryland, and DC; the Hispanic Population Exceeds 20 percent in 4 Western States*, PUB. PERSP., June 1998, at 12 (citing U.S. Bureau of the Census publication).

and a stronger relationship between activity and an increase in the Hispanic population ($r = .344$; $p = .014$). In short, among demographic variables, levels of the black population and trends in the Hispanic population are most closely associated with politically organized opposition to the public use of affirmative action.

The second hypothesis, on high-profile states, was confirmed more strongly than any of the others at the level of descriptive correlation. Raw or total population levels in 1996 ($r = .453$), the degree of metropolitanization in 1994 ($r = .439$), and gross state product in 1994 ($r = .417$) all proved to be strong correlates of anti-affirmative action activity and significant at the .01 level or below.

The third, regional, hypothesis receives at most weak statistical support, depending on one's definition of region.[43]

Figure 1: State Anti-Affirmative Action Activity (1995–1998)



The map appears to show that anti-affirmative action activity is particularly common in the deep South and far West. But the correlation of region with this activity is weak ($r = .214$) and not statistically significant ($p = .144$). And

[43] There is no statistically significant pattern between activity and region if one uses the nine regions of the country as defined by the Bureau of the Census. However, nine regions is probably too many to be meaningful. They are also historically misleading in that they combine Alaska and Hawaii (no activity) with the other three "Pacific" states (which all have activity), and they split the deep South (Mississippi, Alabama, Georgia, Louisiana—all with activity) across three distinct regions. Instead, we dropped Alaska and Hawaii from the regional analysis (results would have been inflated by treating each as a "region of one"), and divided the nation into Eastern, Southern, Midwestern, and Western regions.

actually looking at the map gives one further pause. Activity in the ostensibly libertarian West occurs not in Idaho and Wyoming, but in stereotypically liberal Washington, Oregon, and California. Activity is consistent in the deep South, but does not occur in the Virginias or Arkansas. The purportedly liberal Northeast is less tolerant of affirmative action than the Midwest. In short, as further analyses show, region is mostly trumped by demographic and state size variables.[44]

The data support the fourth, institutional, hypothesis: the presence of direct initiatives is positively and significantly correlated with anti-affirmative action activity ($r = .376$; $p < .01$). Concretely, proposals to abolish the public use of affirmative action have surfaced in fifteen of the twenty states that allow for direct initiatives and in eleven of the thirty remaining states. Thus one might conclude that the initiative process is close to sufficient, but not necessary, to produce anti-affirmative action activity.

The fifth hypothesis, to my surprise, does not receive support. Unified Republican control of state governments is either unrelated to or possibly *inversely* related to anti-affirmative action activity. As with the regional analysis, looking beyond the aggregate statistics is illuminating. In 1995, only seven of the fifteen states which enjoyed unified Republican control (as of 1994) saw anti-affirmative action activity in the legislature. In 1996, only five of the ten analogous states did. Clearly there was no relationship between the presence of conservative control of the government and the likelihood of proposing this particular conservative policy change.

On the presumption that it might take a longer period of Republican control to build up to anti-affirmative action activity, we examined Republican control in 1990 and 1992, and states in which the Party had enjoyed two or three consecutive two-year periods of unified control. Table 1 shows the results of that analysis:

Table 1: Unified Republican Government and Anti-Affirmative Action Activity

Variable	Unified Repub. 1990	Unified Repub. 1992	Unified Repub. 1994	Unified Repub. 1996	Unified Repub. 2 terms	Unified Repub. 3 terms
Pearson r Correlation	-.304*	.061	-.058	-.010	-.012	-.074
Significance (2-tailed)	.034	.679	.693	.944	.937	.612

[44] In a categorical logistic regression, the best model using alternative divisions among regions returns a joint significance of region of only 0.32. It might, of course, be important that the only two states actually to *pass* a measure banning public use of affirmative action are on the West Coast. But statistically speaking, that is anomalous.

Most of these correlations are minimal; nevertheless, all but one is in the opposite direction from that predicted. If it had any effect at all, unified Republican control of government made anti-affirmative action activity less likely.[45]

Finally, I used this data in a logistic regression model to predict whether or not a state engaged in anti-affirmative action activity between 1995 and 1998. As Table 2 shows, seven independent variables show a clear bivariate causal link with anti-affirmative action activity. They are presented here in descending order of magnitude and significance:[46]

Table 2: All Potential Bivariate Predictors of State-level Anti-Affirmative Action Activity

	R	Significance
Metropolitanization, 1994	.2997	.0041
Total population, 1996	.2994	.0042
Gross state product, 1994	.2823	.0061
Direct initiative	.2577	.0102
Percent black, 1994	.2530	.0112
Hispanic change, 1980–96	.2149	.0226
Black change, 1980–96	.1532	.0569

While any of these variables might reasonably be seen as a cause of anti-affirmative action activity, problems of multicollinearity dictate that only a few can go into a parsimonious predictive model. The three independent variables with the highest bivariate regression coefficients (metropolitanization, population size, and gross state product) are correlated with each other at a very high level of around 0.9. This is to be expected, because all three are alternative measures of state prominence. It is inefficient, however, to include more than one of them in a predictive model. After a little experimentation that even included one "perfect" but relatively trivial model,[47] we ended up with the following powerful logistic equation:

$$\text{Activity} = B_0 + B_1\text{RawPop} + B_2\text{Initiative} + B_3\text{Black} + B_4\text{HispanicChange}.$$

[45] The statistically significant negative figure for 1990 is of little theoretical importance, given that organized anti-affirmative action activity did not begin until 1995.

[46] A dummy variable based on being one of the 19 states to receive the greatest number of illegal immigrants in 1996 was also causally linked to activity and borderline statistically significant at the bivariate level. It did, however, not survive in the multivariate analysis due to the multicollinearity with total population.

[47] *See supra* note 16.

Each predictor holds up in the multivariate regression, and the model is jointly very highly significant ($p < .00001$).[48] Table 3 provides the precise results of this regression analysis:

Table 3: Predictors of States with Anti-Affirmative Action Activity, 1995–1998

	B (standard error)	significance	R
Total population in 1996	5.40E-07 (2.35E-07)	.022	.218
Initiative process	3.68 (1.41)	.009	.263
Percent Black in 1994	19.20 (7.35)	.009	.237
Hispanic change, 1980–96	.027 (.011)	.016	.233
Constant	-7.01 (2.35)	.003	—

Perhaps the best way to judge the power of these four predictors is to examine how much they together reduce the error that would occur if one made random guesses about whether a state does or does not have anti-affirmative action activity. In this case, the error is reduced by 66%—a very high proportion. Put another way, the model correctly predicts the status of forty-two out of fifty states, as compared with a likely prediction of only twenty-five states if one simply tossed a coin.[49]

[48] Kellough et al. similarly find that the proportion of the state's population that is minority is significantly related to the appearance of legislative activity opposing affirmative action. *See* Kellough, *supra* note 33, at 15–19. They found no significant relationship between anti-affirmative action activity and the vote for President Bush in the 1992 election, state median income, percent of high school graduates, presence of a Republican governor, region, history of innovation, and other measures. *See id.*

[49] According to this analysis, the state of Washington was not an obvious candidate to be the only other state besides California in which an anti-affirmative action initiative reached the voters. It has a small black population (3.1%), and not an especially large total population

B. *Explaining the Results*

1. *Population Size*

The least self-evident of the four factors that remained in the final regression equation is that of state population (alternatively, gross state product, which had almost the same statistical impact). I would not have predicted its strong impact compared, say, with the negligible impact of having a unified Republican government. But in retrospect, several explanations seem plausible.

The cases of California, Washington, and Houston—the three locations where the effort to abolish public use of affirmative action has been put to a vote—all demonstrate the centrality of one or a few political entrepreneurs[50] in getting the issue on the ballot. Any state or locality, of course, can produce a skilled political actor who has financial resources, time, and a passionate commitment to an issue—but other things being equal, the larger the number of people in a political jurisdiction, the more likely such a person is to emerge.

That factor becomes especially important when coupled with the second of

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(fifteenth in the nation). It does, however, allow for direct initiatives, and it has a rapidly growing Latino population (from a small base).

Two additional factors not captured by our statistical analysis were also at work in this case. Those were the presence of a few effective political entrepreneurs and an effective media campaign. *See* Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738 (1997); Steven A. Holmes, *Washington State Is Stage for Fight over Preferences*, N.Y. TIMES, May 4, 1998, at A1; Craig Welch, *The Mouth That Roars*, SPOKANE SPOKESMAN REV., Oct. 11, 1998, at A1. Both variables are not easily susceptible to statistical analysis, unfortunately, because their presence is clearly visible only in retrospect. In addition, "[n]o comparative state study . . . has attempted to integrate a state-specific media measure, most likely due to the difficulty of measurement." Hays, *supra* note 37, at 7.

[50] A political entrepreneur is a person who operates in the public sector, seeking to:

> 1. identify *new missions and programs* . . . ;
> 2. develop and nourish *external constituencies* to support the new goals and programs, . . . ;
> 3. create *internal constituencies* [within an agency or political body] . . . ;
> 4. enhance the organization's [or political operatives'] *technical expertise* . . . in order to . . . implement new goals and programs;
> 5. *motivate and provide training for members* of the organization . . . ; and
> 6. . . . *identify areas of vulnerability*, followed by remedial action.

JAMESON W. DOIG & ERWIN C. HARGROVE, LEADERSHIP AND INNOVATION: A BIOGRAPHICAL PERSPECTIVE ON ENTREPRENEURS IN GOVERNMENT 8 (1987) (citation omitted). No single person can do all of these things; an effective political entrepreneur is one who does enough of them to attain a substantial portion of his or her new mission or program.

the four key variables, the presence of a direct initiative process in the state (or municipality, as in Houston). Initiatives give political entrepreneurs an institutional framework within which to operate that is more accessible and free-wheeling than a state legislature; conversely, political entrepreneurship is essential for any issue to make it onto the ballot for a vote by the citizenry.

It may also be the case that states with large populations attract political entrepreneurs from outside the state as well as from inside it, for substantive as well as strategic reasons. Because small and large states have roughly similar legislative processes, using roughly similar amounts of scarce resources in a large state will produce a proportionally greater payoff in the substantive sense of ending affirmative action for the most people. In addition, states with large populations have a large number of votes in the electoral college, and will be reported in highly visible national media. Thus, a political entrepreneur with national electoral ambitions such as Governor Wilson in California will gain more than simply one state's worth of political benefit by mounting an anti-affirmative action campaign in a large rather than a small state.

The analysis of state size and wealth helps to explain why anti-affirmative action activity occurs in some states but not others. It does not explain why that activity has so far mostly failed. The presence of a direct initiative process similarly does more to explain where activity occurs than it explains why activity fails. Let us examine that claim more closely.

2. *The Role of Direct Initiatives*

I already noted that initiatives offer greater scope for the actions of a political entrepreneur. In addition, they make it possible to bypass a legislature in which legislative action is being blocked. That route to success must seem especially appealing to opponents in view of the strong and consistent public opposition (mostly among whites, a large majority of the voting public) to affirmative action when framed in terms of preferences, reverse discrimination, or quotas.

To understand the next step—why activity is being blocked in the legislature, and why even efforts to end affirmative action through the initiative process have, with two exceptions so far, failed—we need to turn to the third and fourth variables which survived in the final regression equation.

3. *The Conflicting Political Impact of Nonwhite Residents*

The key to explaining *both* why anti-affirmative action activity occurs *and* why that activity has largely failed so far lies in the complex political implications of having a large or growing nonwhite population in a state. On the one hand, in states where the proportion of blacks and the rate of increase in

the Latino population is high, some whites presumably feel materially or symbolically threatened, and their representatives respond by generating activity to oppose affirmative action.[51] This is a variant on V.O. Key's classic thesis about white domination in areas with large black populations[52] although I see no reason to believe that proponents of anti-affirmative action measures themselves see their activities in that framework. On the other hand, it is exactly in the states with large or growing nonwhite populations that white politicians, corporate officials, and citizens are coming to terms with a changing demographic mix and learning to deal with—or even see advantages in—the changing demography. It is also in those states that African Americans or Latinos are developing the capacity to defend their interests in the political arena, and they usually define those interests to include public provision of affirmative action.

Consider first the changing perspective of white elites and citizens. The Conference Board[53] is now promoting conferences on "managing diversity for sustained competitiveness," in which the president and CEO of DuPont Corporation is prominently quoted as saying that "we have proof diversity improves our business performance . . . . Diversity in our company is itself a business imperative vital to our ongoing renewal and our competitiveness into the 21st century."[54] The four hundred executives attending such a conference had at least two motives, beyond liberal good will, for their newfound enthusiasm for diversity. At a minimum, "[t]hroughout the conference, executives quietly said they do not want what happened at Texaco to happen to

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[51] D. Garth Taylor similarly finds that an increase in nonwhites, rather than the absolute number of nonwhites, is associated with an increase in hate crimes in particular neighborhoods in Chicago. *See* D. GARTH TAYLOR, WHEN WORLDS COLLIDE: CULTURE CONFLICT AND REPORTED HATE CRIMES IN CHICAGO (1992) (a report to The Chicago Commission on Human Relations); *see also* Donald Green et al., *Defended Neighborhoods, Integration, and Hate Crime*, AM. J. SOC. (forthcoming 1998).

[52] *See* V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION (2d ed. 1984). The finding with regard to absolute proportions of nonwhites is Kellough et al.'s chief explanation for the difference between states with and without anti-affirmative action activity; they provide several citations to support it. *See* Kellough, *supra* note 33; *see also* Benjamin Radcliff & Martin Saiz, *Race, Turnout, and Public Policy in the American States*, 48 AM. RES. QTRLY. 775 (1995); Marylee Taylor, *How White Attitudes Vary with the Racial Composition of Local Populations*, 63 AM. SOC. REV. 512 (1998).

[53] Founded in 1916, the Conference Board, in the words of the frontispiece of every Board publication, "strives to be the leading global business membership organization that enables senior executives from all industries to explore and exchange ideas of impact on business policy and practices." *See, e.g.*, *infra* note 61.

[54] MARGARET HART, MANAGING DIVERSITY FOR A SUSTAINED COMPETITIVENESS 5 (1997).

them."[55] More positively, they are discovering that firms which seek to appeal to a wide array of potential purchasers do better if they have a sales force and managers representative of disparate languages and cultures.[56] Thus, affirmative action is, in the eyes of some executives, a necessary though insufficient step on the way to the desired diversity.[57] In this new corporate climate, visible support for measures opposing affirmative action in the public arena is simply a bad business practice.[58]

The participants in this conference may have been unusual in their newfound enthusiasm for diversity, and therefore affirmative action, but they were not unique.[59] A 1995 survey of corporate CEOs found that 70% of the 140 surveyed, all of whom were affected by contract compliance programs, reported favorable effects of their affirmative action programs. The same proportion claimed that they would still use numerical goals to track fairness in the workplace even if governmental regulations were abolished. They feared the loss of uniform federal standards and the consequent variation in state and

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[55] *Id.* at 5. In late 1996, a senior executive of Texaco Oil Company secretly taped several other executives making demeaning comments about African-American employees and deciding how to destroy evidence of discriminatory hiring and promotion in the corporation. The tapes were made public, and the political uproar was intense. It was resolved by a record settlement of $176.1 million to compensate salaried black employees and to design programs to overcome discrimination. As the vice president for human resources at Texaco reminded the conference attendees, "[w]hat happened to us can happen to you in a heartbeat." *Id.* at 19.

[56] According to the first vice president and senior director of Merrill Lynch, Inc., "[o]ur clients, our shareholders are demanding more and more that our employees look like them," Peter Truell, *The Black Investor, Playing Catch-Up*, N.Y. TIMES, Aug. 23, 1998, § 3, at 1.

[57] "At Phillip Morris, 'diversity and affirmative action are very much connected. Affirmative action builds the workforce, including women and people of color. It promotes the understanding with regard to persons with disabilities, accommodation, and veterans.'" HART, *supra* note 54, at 11 (quoting Shirley Harrison, Vice President of Diversity Management at Phillip Morris); *see also* Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management*, 41 AM. BEHAV. SCI. 960 (1998).

[58] In this way, affirmative action is like environmental policy and guaranteed health insurance. Large corporations can generally afford to support, or at least not oppose, these measures. In addition, they maintain better relations with a wider array of potential customers by taking neutral or slightly liberal positions than by taking strongly conservative stances that purportedly would be more consistent with their market orientation.

[59] In recent months, IBM has widely distributed an ad with a rainbow coalition of happy workers consulting around a table beneath the headline "Diversity works." The text below the picture reads, "It has long made sense to us at IBM to welcome and value individual differences . . . . In our diverse marketplace, that's always good business." ATLANTIC MAG., June 1998, at 43 (paid advertisement by IBM).

local requirements.[60] This result demonstrates a dramatic change over a decade; in 1986, a Conference Board survey of human resource executives in six hundred major U.S. companies found that "equal employment opportunity" ranked twenty-second out of twenty-four concerns—just above sexual harassment.[61]

Thus opponents of affirmative action have found to their surprise and disgust that their apparent allies in the conservative business community either reject or politely distance themselves from political efforts to abolish affirmative action. California's Proposition 209 was funded largely by the Republican Party and individual Republican political actors. Corporations such as Shell Oil Company, Boeing Corporation, Nordstrom's, and Pacific Gas and Electric Company opposed it.[62] Proposition A in Houston was funded mostly by the leader of the initiative and the American Civil Rights Coalition;[63] the Houston Chamber of Commerce opposed it. Boeing, Weyerhauser, and Microsoft opposed the proposition in the state of Washington, and Nordstrom's remained neutral. No major corporation in the state supported it.[64] Thus, although corporations will continue to defend themselves against claims of discrimination, and although it will be a long time—if ever—before corporate leadership resembles the American racial, ethnic, or gender structures,[65] it

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[60] *See Affirmative Action: A Course for the Future*, LOOKING AHEAD, Aug. 1996, at 17 (publication of the National Planning Association, citing Peter Robertson).

[61] *See* Lawrence Schein, *Current Issues in Human Resource Management*, 190 RES. BULL. 3–17 (1986) (publication of The Conference Board).

[62] For a rather cynical description and explanation of "the lovefest between the advocates and the corporate establishment" with regard to Proposition 209, see Heather MacDonald, *Why They Hate CCRI*, WKLY. STANDARD, Oct. 28, 1996, at 24. For additional typical comments, see Amy Wood, *Going Nowhere Fast: Affirmative Action Opponents Stymied in the States*, S. CHANGES, Spring 1998, at 10.

[63] "The American Civil Rights Coalition is a grassroots advocacy organization focused on the elimination of racial and gender preferences. Working with activists in different states and in Washington D.C., ACRC will seek to achieve the same success achieved in California in other states and at the federal level." *American Civil Rights Coalition* (visited Sept. 21, 1998) <http://www.acrcl.org/>. The founder and chair of the ACRC is Ward Connerly, a Regent of the University of California. He is an African American, a businessman, and a friend and supporter of Governor Wilson. He spearheaded and was largely responsible for the abolition of affirmative action in the state university system of California in 1996. *See American Civil Rights Institute*, (visited Sept. 21, 1998) <http://www.acri.org/people/index.html>.

[64] *See* Cragg Hines, *Affirmative Action Faces Test in Washington State Election*, HOUS. CHRON., Oct. 22, 1998, at A12; Steven Holmes, *Washington State is Stage for Fight over Preferences*, N.Y. TIMES, May 4, 1998, at A1; Patrick Mazza, *Northwest Passage?*, BLACK ISSUES IN HIGHER EDUC., Sept. 17, 1998, at 26–28.

[65] Corporations have by no means solved the problem of racial discrimination in their

nevertheless is safe to predict that most corporations will not actively support measures to abolish affirmative action in the states or in Congress.[66]

Likewise, leaders of elite educational institutions will not support measures to abolish affirmative action. Almost all of the most senior administrators of the University of California system opposed the 1996 abolition of affirmative action in admission to publicly supported higher education.[67] Even the president of San Jose State University, who "had written stinging critiques of affirmative action" is "now more disposed toward it."[68] In light of the decline in the number of African Americans and Latinos admitted to the University of California after affirmative action was abolished, President John Bunzel realized that "'there are no airtight, completely coherent, unassailable and holistic answers on the question of affirmative action that are not only theoretically perfect, but instrumentally practical.'"[69] The senior administrators of the University of Texas system similarly opposed the abolition of affirmative action during the litigation of *Hopwood v. Texas*.[70] Administrators in other beleaguered state university systems are seeking to defend affirmative action in admissions as much as they can in the current legal climate.[71] President Neil Rudenstine of Harvard University devoted a major report to a defense of affirmative action and diversity,[72] and the sixty-two institutional members of the Association of American Universities recently "express[ed their] 'strong

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ranks. For a reminder that "systemic and even overt discrimination" remains in the workplace, see Frank McCoy, *Lawsuits Rock Corporate Discrimination*, FOCUS: THE MONTHLY MAGAZINE OF THE JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, Oct. 1997, at 3–4.

[66] Small or independent business owners *are* likely to support measures opposing affirmative action. That was the pattern in California with regard to Proposition 209, and the Houston Contractors Association supported the effort to abolish set-asides in Houston.

[67] *See, e.g.*, Chang Lin Tien, *What a University Can Learn and Teach About Conflict and Difference*, *in* DILEMMA AND PROMISE: PERSPECTIVES ON RACIAL DIVERSITY AND HIGHER EDUCATION (Eugene Y. Lowe, Jr., ed., forthcoming 1998) (manuscript on file with author); Electronic mail from Ruben Martinez to Listserv < diversity@lists.Colorado.EDU > (July 25, 1995) (releasing statements by University of California President Jack Peltason) (on file with author).

[68] *See* Steven A. Holmes, *Re-Rethinking Affirmative Action*, N.Y. TIMES, Apr. 5, 1998, §4, at 5.

[69] *Id.*

[70] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[71] *See, e.g.*, Jeffrey Selingo, *Affirmative Action Plan for the 90's? Wisconsin Tries for Diversity Without Numerical Goals*, CHRON. HIGHER EDUC., May 8, 1998, at A40; *UW President Backs Affirmative Action in Speech to Grads*, BLACK ISSUES IN HIGHER EDUC., July 9, 1998, at 10.

[72] *See* Neil L. Rudenstine, *The President's Report: Diversity and Learning*, HARVARD GAZETTE, Feb. 8, 1996, at 26–28.

conviction concerning the continuing need to take into account a wide range of considerations—including ethnicity, race, and gender—as we evaluate the students whom we select for admission.'"[73]

Like corporate executives, university administrators have a variety of motivations, including but not limited to liberal racial convictions, for supporting affirmative action. Protecting their long-term political and economic interests is one important motivation, especially for public universities. As a law professor at the University of Texas pointed out, "'If the majority of people in this state are going to be Mexican-American and African American, and they are going to assume many of the leadership roles in the state, then it's going to be big trouble if the law school doesn't admit many minority students—it's going to be a bomb ready to explode.'"[74] The president of the University of Wisconsin system was even more blunt: "'It would be much easier to let the [affirmative action] plan we have expire and do nothing . . . . But we are committed to maintaining educational opportunities for all citizens. We're a public university, and minority parents pay taxes to support this university just as whites do.'"[75]

As these comments begin to suggest, white elected officials are in the most complicated position, and their stance with regard to measures to abolish affirmative action is fascinatingly complex. States with substantial black populations or rapidly growing Latino populations are the states most likely to experience political efforts to abolish the public use of affirmative action.[76] But those are also the states in which blacks, and increasingly Latinos, are moving into political offices.[77] Those newly elected officials can sometimes block anti-affirmative action measures by virtue of their own position in the legislature.[78]

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[73] Karen W. Arenson, *62 Top Colleges Endorse Bias in Admissions*, N.Y. TIMES, Apr. 24, 1997, at A27. The American Council on Education also issued a slightly weaker statement of support for "diversity," endorsed by 49 additional educational associations. *See ACE Adopts Diversity Statement*, BLACK ISSUES IN HIGHER EDUC., Feb. 19, 1998, at 32.

[74] James Traub, *Testing Texas*, NEW REPUBLIC, Apr. 6, 1998, at 20 (quoting Russell Weintraub, Professor, University of Texas Law School).

[75] Selingo, *supra* note 71, at 46 (quoting Katherine C. Lyall).

[76] Hero explores how state politics and policies differ, depending on the racial and ethnic composition of the state. He does not consider affirmative action, but his analysis provides a useful context for my discussion here. *See* HERO, *supra* note 37.

[77] As of 1993 (the last year for which data are available on blacks), 561 United States federal and state legislators or elected executives were black, and as of 1994 (the last year for which data are available on Hispanics) 199 were Hispanic. *See* STATISTICAL ABSTRACT, *supra* note 39, at 286 tbl., 458, 459.

[78] As a member of the South Carolina Black Caucus put it with regard to a bill to ban affirmative action in state agencies, "'[T]he Black Caucus had an opportunity to tie the bill up. . . . We don't have enough power to pass something, but we do have enough to stop some

At other times, they can persuade fellow legislators to halt an effort whose consequences matter deeply to them and their constituents, but much less to most others.[79] After all, few lawmakers want to antagonize colleagues who feel passionately about an issue or whose constituents do, especially if it is an issue that is less salient to themselves or their own constituents.

A substantial black or rapidly growing Latino population creates an additional set of cross pressures on white elected officials. Because white Democratic politicians do not want to alienate the predominantly Democratic black voters in their state, they are reluctant to oppose affirmative action. But, because they also seek to halt the trend of the past few decades in which white male Democrats are moving into the Republican party, they are equally reluctant to support affirmative action too strongly. They mostly want the issue to go away. White Republican politicians are eager to woo even a small fraction of the black middle class away from the Democrats. And they are even more eager, because it is a more likely prospect, to attract newly-middle-class or newly-naturalized Latino voters into the ranks of their party.[80] Thus, many of them are reluctant to oppose affirmative action. But their chief constituency in the 1990s is working- and middle-class whites, many of whom oppose strong forms of affirmative action—therefore, they are also reluctant to support it. Like the Democrats, Republican politicians mostly want the issue to go away.[81]

Thus we see several rather distinct behaviors among white elected officials, depending on their political calculations as well as their convictions. One set of Republican politicians follows the lead of Governor Pete Wilson of California—aggressively opposing affirmative action. They are the state legislators sponsoring bills, constitutional amendments, or constitutional initiatives in the twenty-five or so states discussed above.[82]

A second and considerably larger set of politicians of both parties seeks simply to avoid the issue. In an article headlined "Engler Quiet on Racial Quotas: Governor Soft-Pedals Affirmative Action, Fears It's a No-Win Situation . . . ," the Republican governor of Michigan claims that "'I've not

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things.'" Wood, *supra* note 62, at 5.

[79] *See supra* note 21 and accompanying text.

[80] "'If we remain a party of all white Southerners,' says one former Republican National Committee aide, 'we'll be a dead party by 2010.'" David Grann, *Close Races*, NEW REPUBLIC, Mar. 9, 1998, at 11, 12.

[81] Wood provides an excellent recent description of state legislators' responses to anti-affirmative action bills; as she summarizes, "[B]ills are stalling because there is not a Republican consensus." Wood, *supra* note 62, at 6. For a similar conclusion, although not always a similar analysis to my own, see John D. Skrentny, *Republican Efforts to End Affirmative Action: Walking a Fine Line* (forthcoming 1999) (on file with author).

[82] *See supra* Part II.A.

looked at' [a] proposed . . . initiative to ban affirmative action in state hiring, contracting, and college admissions."[83] The Governor went on, "'[B]ut I think perhaps the better approach is to allow the courts to rule on the case and that may clear some of the confusion over what the rules are and at the same time reduce the tension surrounding the issue'"—this from a partisan, activist conservative "not generally known as a man to mince words."[84] Collective political bodies are responding the same way as individual politicians; typical headlines point out that "Legislatures Show Little Enthusiasm for Measures to End Racial Preferences"[85] or "Few Governors Join Attack on Racial Policies."[86] After all, "it's not the most party-broadening issue that we could pursue at this time."[87]

A third, and the most interesting, group of white politicians cycles among support for, silence about, and opposition to measures to abolish affirmative action. This is the pattern of several nationally prominent Republicans, who must respond to many conflicting constituencies at once. Consider the history of Speaker of the House of Representatives Newt Gingrich on affirmative action:

- November 1991: "'Why should Bill Cosby's daughter have an eligibility for a 10% set-aside based on race? . . . If it is numerical, and if it is genetically based, it is wrong and it is a violation of everything America stands for.'"[88]
- 1994: "I don't think we should use affirmative action as a wedge issue"—explaining why it was left out of the Contract with America.[89]
- February 1995: "'It is antithetical to the American dream to measure people by the genetic pattern of their great-grandmothers.'"[90]
- August 1995: Republicans should "'spend four times as much effort

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[83] Mark Hornbeck, *Engler Quiet on Racial Quotas: Governor Soft-Pedals Affirmative Action, Fears It's a No-Win Situation, Experts Say*, DET. NEWS, May 18, 1998, at D1.

[84] *Id.*

[85] Peter Schmidt, *Legislatures Show Little Enthusiasm for Measures to End Racial Preferences*, CHRON. HIGHER EDUC., Mar. 13, 1998, at A44.

[86] David S. Broder & Robert A. Barnes, *Few Governors Join Attack on Racial Policies*, WASH. POST, Aug. 2, 1995, at A1.

[87] Frank Langfitt, *GOP Abandons Effort on Minority Set-Asides*, BALT. SUN, May 23, 1995, at 1B.

[88] Judy Keen & Richard Benedetto, *White House Scramble Muddies Bush's Message*, USA TODAY, Nov. 22, 1991, at A1.

[89] John Pitney, *Why Affirmative Action Is Forgotten Issue*, Reuters North American Wire, May 29, 1996, *available in* LEXIS, News Library.

[90] Bob Minzesheimer, *Affirmative Action Under Fire*, USA TODAY, Feb. 23, 1995, at 4A.

reaching out to the black community . . . as compared to the amount of effort we've put into saying we're against quotas and set-asides.'"[91]

- June 1996: It would be a "strategic mistake" for Senator Dole to champion Proposition 209 during his presidential campaign.[92]
- February 1997: "We are going to pursue an all out effort to end affirmative racism in America."[93]
- July 1997: "'We need 80 percent of our effort on proving we have found a better way to solve the problem and 20 percent of our effort on ending affirmative action.'"[94]
- November 1997: Gingrich publicly opposed the appointment of Bill Lann Lee as Assistant Attorney General for Civil Rights—"an unusual action for a House leader who usually does not become involved in Administration appointments . . . ."[95] Speaker Gingrich opposed Lee's purported effort to mandate "'racial and gender preferences in the Los Angeles Police Department'" because it "was an attempt to thwart 'the will of the people of California . . . .'"[96]

Representative Gingrich is an unusually colorful speaker—which is why I have quoted him so extensively rather than, say, Senator Robert Dole, who shows the same pattern. But his eloquence does not hide his waffling. He is not inconsistent in his opinion; at least since the late 1980s, he has opposed affirmative action based on race or gender and supported mild forms of it based on poverty or cultural deprivation. But he is perennially inconsistent in his behavior; he sometimes leads the charge against affirmative action, sometimes seeks to deflect the issue and keep it off the congressional agenda, and sometimes claims to be leading the charge, but in fact seeks to deflect it. His Republican critics have taken scathing note of this behavioral inconsistency,[97]

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[91] Jennifer Corbett, *Gingrich Warns GOP on Effort to End Preferences*, L.A. TIMES, Aug. 8, 1995, at 1.

[92] Ken Chavez, *Gingrich to Dole: Back Off CCRI*, SACRAMENTO BEE, June 27, 1996, at A1.

[93] *Flag-Burning Issue Returns to Congress*, CHATTANOOGA FREE PRESS, Feb. 13, 1997, at A4.

[94] Christopher Caldwell, *The Meritocracy Dodge: Defenders of Affirmative Action Go on the Attack*, WKLY. STANDARD, July 14, 1997, at 23.

[95] Steven A. Holmes, *Senator Deals Serious Setback to Clinton Choice for Rights Job*, N.Y. TIMES, Nov. 5, 1997, at A16.

[96] *Id.*

[97] Patrick Buchanan accused people "inside the Republican Party" of "creeping timidity." *This Week with David Brinkley* (ABC television broadcast, July 2, 1995). Representative Canady observed a "big disconnect" between the Speaker's words and actions. *See* Michael A. Fletcher, *Opponents of Affirmative Action Heartened by Court Decision*,

but it is probably the right political strategy and is probably appreciated by most of his less vocal Republican colleagues.

Representative Gingrich's and Senator Dole's dilemma, as well as that of white Democratic politicians, is exacerbated by several demographic and political dynamics in the African American and Latino communities. On the one hand, almost three in ten blacks describe themselves as politically conservative, and an additional third are "moderate."[98] The African American middle class is growing, if slowly;[99] middle-class African Americans remain more socially and economically liberal than middle-class whites,[100] but they are more conservative about taxation, welfare, school vouchers, and the role of the market than are poorer African Americans,[101] and more conservative than were earlier generations of blacks.[102] More African Americans than whites give a conservative response to survey questions about legalizing marijuana,[103] prayer

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WASH. POST, Apr. 13, 1997, at A21.

[98] *See Thinking by Ethnicity*, PUB. PERSP., Feb./Mar. 1998, at 55; David A. Bositis, *1997 National Opinion Poll: Politics* (The Joint Center for Political and Economic Studies, Washington, D.C. 1997), at 38 fig.2 [hereinafter Bositis, *Politics*]; David A. Bositis, *1996 National Opinion Poll: Political Attitudes* (Joint Center for Political and Economic Studies, Washington, D.C. 1996), at tbl.3 [hereinafter Bositis, *Political Attitudes*].

[99] *See* JENNIFER HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION 43–45 (1995).

[100] *See* 2 THE STATE OF DISUNION: 1996 SURVEY OF AMERICAN POLITICAL CULTURE, tbls.6A-H, 7, 10A-S, 11, 42A-H (The Post-Modernity Project, The University of Virginia ed., 1996) [hereinafter STATE OF DISUNION]; MOLLYANN BRODIE, THE FOUR AMERICAS: GOVERNMENT AND SOCIAL POLICY THROUGH THE EYES OF AMERICA'S MULTI-RACIAL AND MULTI-ETHNIC SOCIETY § 2 (1995); Katherine McFate, *1996 National Opinion Poll: Social Attitudes* (Joint Center for Political and Economic Studies, Washington, D.C. 1996), at tbls.A7, B1; Bositis, *Politics*, *supra* note 98, at tbl.6; David A. Bositis, *1997 National Opinion Poll: Children's Issues* (Joint Center for Political and Economic Studies, Washington, D.C. 1997), at tbl.1; MICHAEL DAWSON, BEHIND THE MULE 181–84 (1994); Bositis, *Political Attitudes*, *supra* note 98, at tbls.2, 3, 7, 8, 11.

[101] Susan Welch & Michael Combs, *Intra-racial Differences in Attitudes of Blacks*, 46 PHYLON 91–97 (1985); Wayne Parent & Paul Stekler, *The Political Implications of Economic Stratification in the Black Community*, WESTERN POL. Q. 521–37 (1985); Steven Gregory, *The Changing Significance of Race and Class in an African American Community*, AM. ETHNOLOGIST 255–74 (1992); KATHERINE TATE, FROM PROTEST TO POLITICS (1993).

[102] WARREN MILLER & SANTA TRAUGOTT, AMERICAN NATIONAL ELECTION STUDIES DATA SOURCEBOOK, 1952–1986, tbls.3.33, 3.37, 3.41, 3.45, 3.55 (1989).

[103] GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1996, at 48 (1997); Gallup Poll, Apr. 23–25, 1996, *available in* Public Opinion Online, accession no. 0258084, POLL file.

in the public schools,[104] education vouchers,[105] public recognition of homosexuality,[106] and women's appropriate roles.[107] Only 5% of African Americans identify as Republicans, but 24% call themselves Independents.[108] Among black adults aged eighteen to thirty-four, over a third are Independents.[109] One in seven blacks voted for President Reagan in 1984, and almost one in five voted for George Bush in 1988.[110] In short, there seem to be good grounds for the often repeated Republican goal of attracting up to a fifth of the black population, especially those with good jobs and high incomes, into the GOP.[111]

There is, however, a rub: middle-class African Americans are more racially nationalistic than are poor African Americans[112] and more concerned about issues of racial inequality and discrimination.[113] Affirmative action arguably benefits the African American middle class more than it does the poor, and therefore, motives of interest reinforce motives of ideology and disparate perceptions. In short, if the Republican party has any hope of attracting more than a tiny fraction of black Americans into its ranks, it must avoid association with those (who are mostly Republicans) seeking to abolish affirmative action. That is not an easy task.

The Republican party faces a slightly different set of issues when it considers Latinos. Here too, it seems reasonable for the party to hope to attract at least a substantial minority of Latino voters. Surveys show the majority to be

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[104] *See* Allison Calhoun-Brown, *The Politics of Black Evangelicals: What Hinders Diversity in the Christian Right?*, AM. POL. Q., July 1998, at 81, 93; Gallup Poll, Apr. 23–25, 1996, *available in* Public Opinion Online, accession no. 0258087, POLL file.

[105] *See id.* at 88; *see also* Gallup Poll, Apr. 23–25, 1996, *available in* Public Opinion Online, accession no. 0258093, POLL file; GALLUP, *supra* note 103, at 48; Bositis, *Politics*, *supra* note 98, at tbl.7; Bositis, *Political Attitudes*, *supra* note 98, at tbl.10; McFate, *supra* note 100, at tbl.5.

[106] *See* Calhoun-Brown, *supra* note 104, at 88; *see also* GALLUP, *supra* note 103, at 48.

[107] *See* Calhoun-Brown, *supra* note 104, at 88.

[108] *See Thinking by Ethnicity*, *supra* note 98, at 56.

[109] *See id.*; Bositis, *Politics*, *supra* note 98, at 37 fig.1.

[110] *See Thinking by Ethnicity*, *supra* note 98, at 56.

[111] Thus, a recent series of headlines: "Democrats Fear Loss of Black Loyalty," "Black, yes; Democrats, maybe," "GOP Starts Minority Outreach." Ralph Hallow, *GOP Starts Minority Outreach*, WASH. TIMES, Sept. 17, 1997, at A4; Terry Neal & Thomas Edsall, *Democrats Fear Loss of Black Loyalty*, WASH. POST, Aug. 3, 1998, at A1, A6; *Black, yes; Democrats, maybe*, ECONOMIST, July 18, 1998, at 25–26.

[112] *See* Michael C. Dawson, *African American Political Discontent*, *POLLING* REP. (The Polling Report, Inc., Washington, D.C.), Apr. 18, 1994, at 1, 6–8.

[113] *See* HOCHSCHILD, *supra* note 99, at 72–82.

deeply patriotic,[114] deeply committed to a traditional work ethic,[115] religiously and culturally conservative,[116] and mistrustful of governmental intervention in private life.[117] During the 1990s, just under a third of Americans with Mexican ancestry described themselves as conservative and just over a third described themselves as moderates.[118] Only twelve percent identify as Republicans, but four in ten are Independents, and half of those aged eighteen to thirty-four are Independents.[119] Those are fertile grounds for Republican cultivation.

But Latinos on balance support strong programs of affirmative action—less than African Americans do, but considerably more than whites and Asians do.[120] And many are wary of perceived Republican party efforts to curtail

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[114] *See* RODOLFO O. DE LA GARZA ET AL., LATINO VOICES 79–80, 98, 103, 104 (1992); STATE OF DISUNION, *supra* note 100, at tbls.12A-E, 19, 23G, 44Q, 44AA, 45; Harry Pachon, *U.S. Citizenship and Latino Participation in California Politics*, *in* RACIAL AND ETHNIC POLITICS IN CALIFORNIA 71, 71–88 (Byran O. Jackson & Michael B. Preston eds., 1991).

[115] *See* DE LA GARZA, *supra* note 114, at 59–61, 84–86; STATE OF DISUNION, *supra* note 100, at tbl.4D.

[116] *See* Carole J. Uhlaner, *Perceived Discrimination and Prejudice and the Coalition Prospects of Blacks, Latinos, and Asian Americans*, *in* RACIAL AND ETHNIC POLITICS IN CALIFORNIA, *supra* note 114, at 339, 339–72; Dale Maharidge, *The Sleeping Giant Awakes: The Latino Vote is Coming to an Election Near You—and Neither Major Party is Ready for It*, MOTHER JONES, Jan./Feb. 1998, at 57, 59; DE LA GARZA, *supra* note 114, at 37–39, 57–58, 108, 110–11; STATE OF DISUNION, *supra* note 100, at tbls.14E, 15P, 23C, 44D, 44F, 44J, 84, 87.

[117] *See* DE LA GARZA, *supra* note 114, at 81; STATE OF DISUNION, *supra* note 100, at tbls.22C, 22E-H, 47B.

[118] *See Thinking by Ethnicity*, *supra* note 98, at 55–57; *see also* RODNEY HERO, LATINOS AND THE U.S. POLITICAL SYSTEM 64–66 (1992); DE LA GARZA, *supra* note 114, at 84.

[119] *See Thinking by Ethnicity*, *supra* note 98, at 55–57. Almost 40% of Mexican Americans voted for President Reagan in 1984, and almost a third voted for George Bush in 1988. *See id.* In 1990, before Proposition 187, 45% of California's Latino voters supported Governor Wilson. *See* Maharidge, *supra* note 116, at 57; *see also* Roldolfo O. de la Garza & Louis DeSipio, *Latinos and the 1992 Election: A National Perspective*, *in* ETHNIC IRONIES 1–4 (Rodolfo O. de la Garza & Louis DeSipio eds., 1996); DE LA GARZA, *supra* note 114, at 124–28.

[120] *See* Jennifer Hochschild & Reuel Rogers, Race Relations in a Diversifying Nation 14–15 (1998) (unpublished manuscript) (on file with author); *see also* Lawrence Bobo, *Race, Interests, and Beliefs About Affirmative Action*, 41 AM. BEHAV. SCI. 985 (1998); Michael Hughes & Steven Tuch, *Race, Interests and Beliefs About Affirmative Action*, *in* RACIALIZED POLITICS: VALUES, IDEOLOGY, AND PREJUDICE IN AMERICAN PUBLIC OPINION (David Sears et al. eds., forthcoming); BRODIE, *supra* note 100, at 47–53; *L.A. Times* POLL, Mar. 1995, Survey No. 356; David A. Kravitz & Steven L. Klineberg, Reactions to Two Versions of Affirmative Action Among Whites, Blacks, and Hispanics (1998) (unpublished manuscript) (on file with author).

immigration and punish immigrants (*e.g.*, through Propositions 187[121] and 227[122] in California and elimination of food stamps and Medicaid for most nonnaturalized immigrants in the 1996 national reform of welfare[123]). An unprecedented number of immigrants from Latin America are seeking to become naturalized U.S. citizens,[124] and many of them will register and vote Democratic, partly in order to punish the Republicans—or at least so GOP strategists fear.[125]

Thus the very states in which increasing proportions of Latino would-be students and workers are associated with efforts to abolish affirmative action are the same states in which increasing numbers of new and potential Latino voters are available to either major political party. Whites are currently a disproportionate share of registrants, and an even more disproportionate share of voters[126]—but those disproportions are falling. Should Republican politicians respond to the fears and beliefs of today's majority? If so, they should oppose

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[121] 1994 Cal. Legis. Serv. Prop. 187 (West) (to prohibit state services to illegal immigrants).

[122] 1998 Cal. Legis. Serv. Prop. 227 (West) (to abolish bilingual education in public schools).

[123] *See L.A. Times* Poll, June 2, 1998, Survey No. 413 (exit poll in the California primary election).

[124] *See* William Branigin, *Nation Receives 18,500 Citizens for Its Birthday*, WASH. POST, July 5, 1998, at A3.

[125] *See* Harold Brackman & Steven P. Eric, *At Rainbow's End: Empowerment Prospects for Latinos and Asian Pacific Americans in Los Angeles, in* 2 RACIAL AND ETHNIC POLITICS IN CALIFORNIA 73, 85 (Michael B. Preston et al. eds., 1998); Harry P. Pachon, *Latino Politics in the Golden State: Ready for the 21st Century?, in* 2 RACIAL AND ETHNIC POLITICS IN CALIFORNIA, *supra* at 411, 415–20; H. Eric Schockman, *California's Ethnic Experiment and the Unsolvable Immigration Issue: Proposition 187 and Beyond, in* 2 RACIAL AND ETHNIC POLITICS IN CALIFORNIA, *supra* at 233, 261–62; *A Portrait of the Latino Vote: Socially Conservative, Young—and Turning out in Greater Numbers*, MOTHER JONES, Jan./Feb. 1998, at 58, 59 [hereinafter *A Portrait of the Latino Vote*]; Louis Aguilar, *Capitol View: Republicans Courting Latino Votes*, POLITICO: THE FORUM FOR LATINO POLITICS, Mar. 16, 1998, at 1. Five million Latinos voted in the 1996 presidential election, up almost 20% from the previous election. *See A Portrait of the Latino Vote*, *supra* at 58–59. The number of Latinos voting in the June 1998 election in California was double the number voting in the 1994 primary. *See* Amy Pyle et al., *Latino Voter Participation Doubled Since '94 Primary*, L.A. TIMES, June 4, 1998, at A1.

[126] For example, 55% of the residents of California are non-Hispanic whites, but they represent over 80% of the state's voters. *See* Carl Lutrin & Allen Settle, California's Immigration Initiative in the 1994 General Election 4 (Aug. 29–Sept. 2, 1996) (paper presented at the Annual Meeting of the American Political Science Association) (on file with author). Put another way, Latinos represented 12% of California's voters in June 1998, but 29% of the state's population. *See* Pachon, *supra* note 125, at 415–20; Pyle et al., *supra* note 125, at A1.

affirmative action. Or should they gamble that future margins of victory can come from new, young, potentially conservative Latino voters who are not yet Republicans and maybe not yet even citizens? If so, they should not oppose affirmative action. The right answer is not obvious—hence Governor Wilson's aggressive efforts to abolish affirmative action, Governor Engler's uncharacteristic silence on the issue, and Representative Gingrich's comical twisting and turning.

The Democratic story needs fewer details because it is more familiar, but it is almost as complicated. African Americans are solidly Democratic, and have provided the margin of victory in several presidential and many congressional and state-level races.[127] The Democratic party cannot afford to alienate them, especially the best-off and best-educated, who are the most likely to vote. But there are too few African Americans for the party to rely exclusively on them, so it must attract and retain white voters—who are much less sympathetic to affirmative action. Roughly the same balance of forces obtains in districts where Latinos are a substantial fraction of voters, except that the proportion of voters who are Latino will grow—dramatically in some districts and states. On balance, of course, Democratic politicians and constituencies are more liberal than their Republican counterparts—so they are more favorably inclined toward affirmative action, *ceteris paribus*. Thus, we can predict that most Democratic politicians will support mild forms of affirmative action strongly, but will avoid addressing tougher forms at all or approach them with a gingerly "mend it, don't end it" reform proposal. And that is what most frequently occurs.

In sum, I see no reason to expect a wave of successful efforts to abolish affirmative action through the electoral system, despite the shared predictions of the advocates whom I quoted at the beginning of this Article.[128] Even with the approval of Initiative 200 in the state of Washington, only two states out of fifty ban the public use of affirmative action. So far, current laws, regulations, and practices of affirmative action seem reasonably safe elsewhere.

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[127] *See* FRANK PARKER, BLACK VOTES COUNT (1990).

[128] *See supra* Part I. Some projections of uninvolved observers concur. For example, in May 1998, a proponent of Initiative 200 argued that "'Washington is, I think, the state that will greatly accelerate the movement toward color-blind civil rights laws. . . . [I]f Washington State votes yes on 200, then a lot of states will feel much more comfortable following suit.'" Holmes, *supra* note 49, at A1. The day after Initiative 200 was approved with a 58% majority, the *New York Times* observed that "the vote in Washington is clearly a boost to opponents of affirmative action and is likely to spur efforts to get similar measures on the ballots in other states." Sam Howe Verhovek, *From Same-Sex Marriages to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B1, B10.

III. THE JUDICIAL FUTURE OF AFFIRMATIVE ACTION

But the story does not end here. I will compound my reckless pronouncement of a number and a date at the same time by making another prediction: strong forms of affirmative action may well be abolished through the judicial system over the next few years. Efforts to abolish affirmative action are, in that sense, analogous to efforts to promote school desegregation in the 1950s and 1960s—what cannot be won through the electoral process may be attainable, at least for a while, through the courts.

The analogy with school desegregation goes beyond the basic strategy of seeking victory through the courts as well as through elections. The litigators uncannily resemble the lawyers in the ACLU and NAACP Legal Defense Fund (LDF) in the 1950s and 1960s. They are a small group of ideologically driven, energetic young men (mostly) in nonprofit law firms funded by foundations,[129] out to change the United States for the better by requiring its institutions to live up to the Constitution as they understand it. The two most prominent of the new public interest law firms are the Center for Individual Rights (CIR) and the Institute for Justice.[130] The CIR litigated *Hopwood v. Texas*[131] and is currently involved in two suits against the University of Michigan (one against the liberal arts college and one against the law school),[132] as well as suits against Texas A & M University, the National Science Foundation, City University of New York, the University of Washington Law School, and Alabama State University.[133] The CIR seeks both to have particular programs of affirmative action abolished through these suits and to induce the Supreme Court to declare that "'*[Regents of University of California v.] Bakke* is not the law of the

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[129] For example, the Institute for Justice obtains less than one percent of its $2.5 million budget from corporations (primarily Phillip Morris Co.); the rest comes from individuals and foundations. *See* Telephone Interview by Deborah Schildkraut with the Vice President for Finance (Mar. 17, 1998). Center for Individual Rights lawyers work in private firms and contribute their work pro bono; most of its $1.2 million budget comes from foundations or individual donors. *See* Idris M. Diaz, *Mischief Makers: The Men Behind All Those Anti-Affirmative Action Lawsuits*, BLACK ISSUES IN HIGHER EDUC., Dec. 25, 1997, at 14–21.

[130] The American Civil Rights Institute is another key organization although it remains more in the background. It provides much of the organizational backing and funding for state-level efforts to abolish affirmative action through the electoral system. Its members work closely with the law firms, but it does not litigate cases. *See* David Postman, *I-200 Foes Leading Battle of the Checkbook*, SEATTLE TIMES, Oct. 14, 1998, at A1; Hines, *supra* note 64, at A12.

[131] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[132] *See* Center for Individual Rights, *Our Mission*, (visited Aug. 20, 1998) <http://www.wdn.com/cir>.

[133] *See id.*

land.'"[134]

The second firm, the Institute for Justice, is less involved in ongoing litigation but provides strong support for the efforts of CIR. Its vice-president, Clint Bolick (quoted in one of the opening epigrams of this Article) led the successful effort to prevent the appointments of Lani Guinier and later Bill Lann Lee to the office of Assistant Attorney General for Civil Rights. The Institute has been deeply involved in writing and promoting the bills to abolish affirmative action that have come before Congress several times in the past few years. One of its missions, like the LDF before it, is to train a cohort of young and idealistic attorneys to carry its message and tactics across the nation and into a wide array of issues and venues.

The anti-affirmative action law firms follow many of the same tactics as the firms that pursued school desegregation and other traditional civil rights cases.[135] They carefully choose only those cases that they think they have a reasonable chance of winning,[136] and they concentrate on cases that are most likely to set new precedents.[137] They work only with plaintiffs who will be attractive to the public.[138] Like the ACLU, anti-affirmative action law firms choose some unusual cases or clients so that they can make clear that their concern is one of deep principle rather than shallow politics.[139] They oversee strategy and tactics in the national headquarters, but involve local attorneys to try the cases in court. They seek to bring cases only in the courts of sympathetic judges, most commonly those appointed by Presidents Reagan and Bush.

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[134] Douglas Lederman, *New Lawsuits May Help Determine What's Legal in Affirmative Action*, CHRON. HIGHER EDUC., Mar. 21, 1997 (quoting Michael S. Greve).

[135] *See* David Segal, *Putting Affirmative Action on Trial*, WASH. POST, Feb. 20, 1998, at A1.

[136] *See id.*

[137] *See id.*; Center for Individual Rights, *supra* note 132.

[138] The CIR is extremely sophisticated in its use of the media to build public support for its suits. Its staff chose the lead University of Michigan plaintiff after reading scores of resumes and conducting many interviews of would-be plaintiffs; they coached her very carefully before appearances on national television; they have selectively leaked key components of their arguments to sympathetic journalists in order "to build momentum for their case and to put the university on the defensive." *See* Segal, *supra* note 135. One of its twelve employees is a full-time publicist. Similarly, one of the nine members of the professional staff of the Institute for Justice is a "director of communications."

[139] The ACLU supports "extremists" on the right (Ku Klux Klan, Nazi Party) as well as on the left (Communist Party) in order to show its devotion to the principle of free speech. CIR supports African Americans seeking to abolish regulations on taxi-driving or licensing of hair-dressers, as well as opponents of affirmative action, in order to show that it is opposed to strong governmental regulation rather than anti-black. *See, e.g.*, *Black Student Challenges All-White Scholarship*, BLACK ISSUES IN HIGHER EDUC., Sept. 18, 1997, at 6.

Suits challenging affirmative action are analogous to traditional civil rights cases not only in their structure and the litigators' personal styles and tactics, but also in their reliance on many of the same laws. In particular, CIR's suits against the University of Michigan name the former and current presidents of the university and the dean and admissions dean of the law school in their individual capacities as defendants. The basis is Section 1983[140] which "permits individuals whose constitutional rights have been violated to sue those who, acting under color of state law, violated those rights."[141] The CIR claims that the university's administrators "had sufficient information to know that the UM admissions program clearly violated the Constitution. Hence, we believe they are not immune from damages in their personal capacities."[142] Section 1983 was passed during the era of Reconstruction in order to permit legal action against state officials who used their official position to maintain racial hierarchies.[143] It was revived in the 1960s to be used against Governor George Wallace, Sheriff Bull Connor, and other upholders of the segregationist laws of the South.[144] Traditional proponents of civil rights laws are deeply distressed at its use in suits seeking to ban affirmative action. But the law, of course, does not specify on what side the defendants must be or whether affirmative action policies violate or sustain an individual's civil rights. A claim against a public actor in his or her personal capacity is a powerful legal tactic, well suited to making university or governmental officials think more than twice before vigorously promoting an affirmative action program in the current legal climate.

Finally, suits challenging affirmative action are also analogous to traditional

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[140] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

[141] Center for Individual Rights, *CIR Begins Second Lawsuit Against University of Michigan* (visited Mar. 24, 1998) <http://www.wdn..com/cir/michpr1.htm> (including Michigan questions and answers, <http://www.wdn.com/cir/michqa.htm>).

[142] *See id.*

[143] For a review of the legislative history of § 1983, see, for example, Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 1–20 (1985).

[144] *See, e.g., id.*

school desegregation cases because they look as though they will win more often than they will lose. They have already won an impressive string of victories that have narrowed the scope of affirmative action. The most emblematic of such victories is not widely known, but it demonstrates the thesis of this Article as clearly as an author could hope:

> Barely one week after Houston voters decided against banning affirmative action in the city's contracting and hiring [through Proposition A in November 1997], a Federal judge today threw out a similar program for the county transit authority, accompanying his ruling with a blistering criticism of affirmative action that seems likely to fuel the nation's unresolved legal and political debate over the issue.[145]

At about the same time, the Fifth Circuit Court of Appeals eliminated affirmative action in university admissions in Texas, Mississippi, and Louisiana through *Hopwood*;[146] the Ninth Circuit Court of Appeals found Proposition 209[147] to be constitutional;[148] the Fourth Circuit Court of Appeals invalidated race-based scholarships at public universities in five states;[149] and the Court of Appeals for the District of Columbia eliminated a federal requirement that radio and television stations seek out minority job applicants.[150]

At present, most of the judicial action remains at the district and appeals court levels. The Supreme Court declined to rule on the *Hopwood*[151] or Proposition 209 cases[152] because, as Justice Ginsberg wrote for the Court, "We must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."[153] In other words, the

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[145] Sam Howe Verhovek, *Judge Kills Texas Affirmative Action Plan*, N.Y. TIMES, Nov. 14, 1997, at A33 (reporting on the ruling in Houston Contractors Ass'n v. Metropolitan Transit Auth., 984 F. Supp. 1027 (S.D. Tex. 1997)); *see also* Ron Nissimov et al., *Judge Rejects Last Fall's Vote*, HOUS. CHRON., June 27, 1998, at A1.

[146] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[147] 1996 Cal. Legis. Serv. Prop. 209 (West) (enacted as CAL. CONST. art. I, § 31 in 1996, prohibiting discrimination by public entities).

[148] *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

[149] *See* Podberesky v. Kirwan, 38 F.3d 147, 147 (4th Cir. 1994), *aff'g* 956 F.2d 52 (4th Cir. 1992).

[150] *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).

[151] *See* 518 U.S. 1033 (1996) (denying certiorari).

[152] *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 17 (1997) (mem. denying certiorari).

[153] Henry J. Reske, *Law School Lessons: The Supreme Court Lets Stand a Ruling Barring Race-based Admissions*, A.B.A. J., Sept. 1996, at 29 (quoting Texas v. Hopwood, 518 U.S. 1033 (1996) (Ginsburg, J.) (denying certiorari)). During 1998, the Supreme Court

Court wants to allow the political process to play out a bit further before it rules again on affirmative action.[154]

But the Court's present restraint gives little comfort to proponents of affirmative action. After all, restraint follows a series of decisions suggesting hostility to, or at least suspicion of, policies that differentiate by race (*e.g. Miller v. Johnson*;[155] *Missouri v. Jenkins*[156]). Furthermore, a series of decisions by the Supreme Court on affirmative action over the past two decades has narrowed its scope and increased the stringency of the requirements that an actor needs to meet in order to impose an affirmative action plan on its employees or contractors.

The crucial starting point for affirmative action jurisprudence, of course, was *Regents of University of California v. Bakke*.[157] Just what the *Bakke* ruling held remains controversial, but most actors interpreted it to mean that universities could take race into account along with other factors in admissions decisions. *Wygant v. Jackson Board of Education*,[158] narrowed the scope of affirmative action slightly by rejecting the role-model justification for retaining minority rather than nonminority teachers in decisions about layoffs.[159] The Court did not, however, challenge affirmative action in general or the "goal of promoting racial diversity among the faculty" in particular.[160] Three years later, *Richmond v. J.A. Croson Co.*[161] further narrowed the scope of affirmative action, albeit along a different dimension. It held that city and state set-aside provisions must satisfy the high standard of strict scrutiny, rather than the lower standard of intermediate scrutiny.[162] The next case, *Metro Broadcasting Inc. v. FCC*[163] reinforced the standard of intermediate scrutiny for federal set-asides,[164] thereby showing that the Court was not of one mind

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also declined to take affirmative action cases in Nevada and Florida. *See Affirmative Action Plan Dead in Miami; Court Refuses to Hear* Case, FLA. TIMES UNION, Mar. 10, 1998, at A-1.

[154] That resembles the initial restraint of the Warren Court, which issued very few broad rulings on school desegregation until more than a decade after *Brown v. Board of Education*, 347 U.S. 686 (1954).

[155] 515 U.S. 900 (1995).

[156] 515 U.S. 70 (1995).

[157] 438 U.S. 265 (1978).

[158] 476 U.S. 267 (1986).

[159] *See id.* at 274–76.

[160] *Id.* at 288 n.*.

[161] 488 U.S. 469 (1989).

[162] *See id.* at 495.

[163] 497 U.S. 547 (1990).

[164] *See id.* at 566–68.

about either the overall trajectory or the fine details of affirmative action. But the fine distinctions were swept aside in *Adarand Constructors Inc. v. Pena,*[165] which held that racial classifications at any level of government must be strictly scrutinized in order to see if they are "narrowly tailored" to achieve a "compelling governmental interest."[166]

To some interpreters, that decision "reveals that at least two and perhaps four justices are willing to ban racial preferences in all circumstances"[167] Others seek to demonstrate that contracting is judicially distinct from admissions decisions in higher education, and that the increasingly restrictive line of reasoning from *Croson* to *Adarand* need not—and in the eyes of the Court, does not—extend to schools.[168] A different dimension of interpretation also reveals contradictory inferences from *Adarand*: one interpreter sees the crucial change to be the Court's new willingness to restrict the power of Congress,[169] while another applauds the Court's "meandering course, . . . [and] refusal to issue rules" because it leaves the democratic process of decisionmaking as open and unconstrained as possible.[170]

The Editor of the American Bar Association's *Preview of United States Supreme Court Cases*—as neutral an authority as exists in this vexed arena—writes that it is "not exactly" the case that "all of this sound[s] the death knell for affirmative action."[171] In her view, affirmative action "undertaken to cure

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[165] 515 U.S. 200 (1995) (overruling *Metro Broad., Inc. v. FCC*).

[166] *Id.* at 235–36.

[167] Jeffrey Rosen, *The Color-Blind Court*, NEW REPUBLIC, July 31, 1995, at 19–25. That is why civil rights groups provided most of the funds for an out of court settlement of an affirmative action case in *Taxman v. Board of Educ.*, 91 F.3d 1547 (1996).

> It is rare for any case to be settled once the Supreme Court has agreed to hear the dispute, and virtually unheard-of for third parties to direct the settlement. But the civil rights groups believed that the stakes were so high in this case that it was better to intervene than risk an adverse high-court ruling.

Joan Biskupic, *Rights Groups Pay to Settle Bias Case*, WASH. POST, Nov. 22, 1997, at A1.

[168] *See, e.g.*, Akil Reed Amar & Neal Kumar Katyal, Bakke*'s Fate*, 43 UCLA. L. REV. 1745, 1746 (1996).

[169] *See* Paul J. Mishkin, *Forward: The Making of a Turning Point*—Metro *and* Adarand, 84 CAL. L. REV. 875, 876 (1996).

[170] Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1179 (1996).

[171] L. Anita Richardson, *What Is the Constitutional Status of Affirmative Action? Reading Tea Leaves*, FOCUS ON LAW STUDIES, Spring 1998, at 19.

established past or present discrimination is permissible," although affirmative action programs "established solely to promote racial diversity" are dead.[172]

The Supreme Court might not abolish affirmative action grounded in clearly proven past discrimination—hence my caution about never giving a number and a date at the same time. But the CIR and its allies have chosen their cases very shrewdly; if they can get several appeals courts to declare *Bakke* to be no longer the law of the land in their circuit, as the *Hopwood* appeals court did, then the Supreme Court will most likely feel compelled to intervene to reconcile the disparities among the circuits. At that point, a Supreme Court comprised of its current members may set the bar against affirmative action so high that virtually no firm, university, or contract-letting agency can surmount it. After all, many members of the current Court (and, plausibly, new members over the next decade) are characterologically, if not ideologically, conservative. Affirmative action is, in the eyes of almost all who think hard about it, an anomaly, sitting uncomfortably between the 1964 Civil Rights Act, which ostensibly barred its use, and Americans' desire for real, not merely nominal, racial equality. Even proponents agree that it is a stop-gap, temporary measure—although essential, in their eyes. It is not difficult to envision a cautious, centrist Court deciding that enough is enough, except in rare circumstances.

IV. MAINTAINING MORAL CONSISTENCY ON SLIPPERY TERRAIN

The comparison I am drawing between the era of school desegregation and the era of attacks on affirmative action has not escaped the attention of the chief participants. The Financial Profile of the Institute for Justice begins:

> People once turned to groups like the ACLU when government violated their rights. But as these groups fought in recent years to create a "right" to welfare, to preserve racial preferences, and to block school choice, people increasingly sought a principled alternative that would protect individual rights rather than expand government.
>
> The Institute for Justice opened its doors in 1991 to be that alternative.[173]

Michael Greve, Executive Director of the CIR, justifies an argument about the appropriate "legal baseline" for civil rights laws with the observation, "[t]he

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[172] *Id.*

[173] Institute for Justice, *Investigating in the Institute for Justice: Capitalizing the Fight for Liberty*, (visited Aug. 20, 1998) <http://www.instituteforjustice.org/Profile_Folder/prof_financial.html>.

NAACP learned that in the sixties, and we'll learn that now."[174]

Does this imply that those who celebrated the federal courts' supercession of popular preferences with regard to school desegregation must now do the same with regard to affirmative action if they wish to be morally consistent? To put the same question another way, must those who decried judicial activism and antidemocratic elitism in the former case do the same in the latter? If so, liberals and conservatives should be equally discomfited by the strange career of affirmative action.

If one interprets democratic values in procedural terms, the answer to both questions is "yes." That is, if one sees democratic legitimacy primarily as a matter of popular control over difficult and important policy issues, so long as that control is channeled through neutral electoral institutions and all citizens have an equal chance to express their opinions and cast a vote, then one must accept the continuance of affirmative action with good grace. That will be difficult for ideological conservatives, just as acceding to popular resistance to mandatory school desegregation was difficult for ideological liberals.[175] Alternatively, if one includes defensible decisions by legally chosen judges in fairly conducted trials as part of the legitimate democratic process, then one must accept the possible abolition of affirmative action with good grace. That will be difficult for ideological liberals, just as accepting judicial intervention in school systems was difficult for ideological conservatives. Viewed as an issue of procedural democracy, the strange career of affirmative action seems to exemplify the old saying, "what's sauce for the goose is sauce for the gander."

But if one interprets democratic values in substantive rather than procedural terms—or rather, if one focuses on the fact that the United States is a *liberal* democracy rather than a democracy—the normative implications of the strange career of affirmative action are somewhat different. In this framing, the tension lies between different definitions of liberalism rather than between different ways of putting the concept of democracy into practice.

If one uses the original understanding of liberalism—with its focus on

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[174] Diaz, *supra* note 129, at 15.

[175] After reading an earlier draft, David Orentlicher queries, "why wasn't popular resistance to mandatory school desegregation a situation in which the political process wasn't working properly because of the invidious bias against blacks [in the electoral arena]. . . . In contrast, the political process *is* working properly with respect to affirmative action, and therefore judicial intervention is not justified." He cites JOHN HART ELY, DEMOCRACY AND DISTRUST (1980), in support of his point. The point is a good one. During the period of greatest intervention in school desegregation issues, however (1965–1975, roughly) African Americans *could* vote and hold office. So the issue becomes a subtle judgment about timing, electoral trajectory, and historical counterfactual. It is also worth noting that the ability of a minority (such as African Americans and their allies) to promulgate a complicated and contentious policy like school desegregation would be close to nonexistent even today.

individual autonomy, rights conceived primarily as defenses against others' encroachment, mistrust of governmental power, greater trust of market forces—then one can consistently decry the school desegregation judges and celebrate the anti-affirmative action judges. Such a person is likely to insist, as Ward Connerly and his supporters do over and over, that "'[e]very poll that I have seen which takes a look at the American people's attitudes on preferences will support my position that the majority are opposed to preferences.'"[176] One can also assert, as does the Institute for Justice, that its activities against affirmative action "offer . . . legal and constitutional protection of the American Dream . . . ."[177] In this view, using the courts to abolish affirmative action—because, as Regent Connerly puts it, "'I can't find a legislative body that has the guts, the stomach to do what they should do'"[178]—is *both* liberal *and* democratic. It is liberal because it enhances individual freedom and rights. It is democratic because it produces the policy result that—according to opponents—the majority of the public wants. Because mandatory school desegregation in this view was neither liberal nor democratic, moral consistency lies in supporting judge-made law now after having opposed it then.

However, if one uses the post-New Deal understanding of liberalism—with its focus on respect for group-based diversity as a component of public engagement, rights conceived as the public provision of structures that make it possible for all to attain success, greater trust in governmental than in market forces in some circumstances—then one is in the symmetrically opposite position of consistently celebrating the school desegregation judges and decrying the anti-affirmative action judges. This view is bolstered by the claim that, as Mayor Lanier put it when lauding the defeat of Proposition A in Houston, "This is a very decent city, and while there were . . . those who felt we had reached a level playing field with women and minorities, others knew that is just not the world we live in."[179] It is also bolstered by the belief that strong programs of affirmative action foster rather than inhibit freedom and rights for all Americans, as in the first two epigrams with which this Article began. Thus, in this view, using the courts to abolish affirmative action is *neither* liberal *nor* democratic. It is illiberal because it denies rights and freedom to those whose rights have been denied and whose opportunities are illusory. It

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176 Holmes, *supra* note 49, at A1. That, of course, one of the lessons of the regression analysis described earlier; politicians in states with direct initiatives think that they have a good chance of winning their point, or at least making political gains, if they take the issue of abolishing affirmative action directly to the voters.

177 Institute for Justice, *supra* note 174.

178 Holmes, *supra* note 49, at A1.

179 Julie Mason, *Voters Keep Affirmative Action Program Alive*, HOUS. CHRON, Nov. 5, 1997, at A1.

is undemocratic because—according to proponents—most Americans really do not endorse such a denial. Mandatory school desegregation, in contrast, did support deep understandings of liberalism and democracy;[180] therefore moral consistency lies in decrying judge-made law now after having endorsed it then.

We are back where we started—with two sets of views that start from shared deep procedural and substantive values, but that interpret those values in ways that are made to be incommensurate. Neither extreme is the only possible way to interpret those values, and probably most Americans do not so interpret them. After all, surveys in both California[181] and Houston[182] showed that " '[i]f you give people a middle position, they'll take it' . . . ."[183] But the electoral system is better at muddling toward a "middle position" than is the legal system, which is why advocates on both sides have generally relied more on judges than on voters to attain their ends.

I predict that opponents of affirmative action will come closer to prevailing over the next decade or so than will proponents because they have learned an effective legal strategy from their old adversaries and can use it in the courts of a new generation of judges. Whether abolition of affirmative action will prevail in the long run, as mandatory school desegregation mostly did not, is a question on which I will not venture a prediction. Whether one can be pleased with the abolition of affirmative action through judicial decisions in a morally consistent manner is not a matter for prediction, and here, too, I will refrain from further comment.

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180 *See* JENNIFER HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984).

181 *See* Lempinen, *supra* note 16, at B1.

182 *See* Sam Howe Verhovek, *Houston to Vote on Repeal of Affirmative Action*, N.Y. TIMES, Nov. 2, 1997, at A28.

183 *Id.* (quoting Bob Stein, Dean of the School of Social Sciences at Rice University).